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IN THE

Supreme Court of the United States

October Term, A. D. 1952.

No._____

ADELAIDA LITA DEMOS, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

Petitioner, Adelaida Lita Demos, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review a judgment of that Court entered in a certain cause pending in said Court styled Adelaida Lita Demos, Appellant, vs. The United States of America, Appellee, numbered 14,340 on the docket of said Court; wherein petitioner's motion for rehearing, timely

filed, was finally passed upon by the United States Court of Appeals for the Fifth Circuit, and overruled, and final judgment entered on the 6th day of August, A. D. 1953.

The Opinion of the United States Court of Appeals for the Fifth Circuit on original submission is printed in appendix, not presently reported, (post, pages 16 to 23). The motion for rehearing was denied without written opinion.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

The opinion of the United States Court of Appeals for the Fifth Circuit was handed down on June 26th, 1953, and motion for rehearing timely filed in accordance with applicable rules of said Court of Appeals was passed on by the Court and overruled on August 6th, 1953.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals erred in holding that the evidence was sufficient to sustain the petitioner's conviction, and not thereby causing a miscarriage of justice for the reason that there is no evidence in the record showing that the petitioner was guilty of the offense of sale of heroin to Government witness, Stowers.

2. Whether the Circuit Court of Appeals erred in holding that there was no entrapment of the petitioner as a matter of law by the agent, Stowers, the undisputed proof showing no evidence of grounds of suspicion that petitioner was engaged in the illicit drug traffic, and also showing that there was no predisposition of petitioner to commit the offense charged, while the undisputed evidence shows a clearly laid plan of inciting and coercion of petitioner to commit the offense, if she committed it.

3. Whether, permitting the Government to prove extraneous offenses, where intent and system was not an issue, even though not objected to, was a denial of due process.

STATUTE INVOLVED

United States Code, Title 26, Sec. 2554 (a).

STATEMENT

The petitioner was charged jointly in the first count of an indictment together with one Richard A. Najera with having sold heroin to Sam F. Stowers, a government agent, and in counts 2 and 3 the said indictment Najera was charged singly with making other sales to Stowers, and to which counts the said Najera had entered a plea of guilty, and on a trial before a jury the petitioner and Najera were convicted of the sale charged in the first count.

Notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit was filed, which appeal was duly perfected, and on the 26th day of June, 1953, the judgment of conviction against petitioner was affirmed, a motion for rehearing timely filed was overruled on August 6th, 1953.

Only two questiones were presented to the Circuit Court of Appeals, the first being that although no motion for an instructed verdict upon the ground that the evidence was insufficient to authorize the Court to submit the case of petitioner to the jury was filed by petitioner, yet the evidence was so clearly insufficient that a review of the same was required to prevent a manifest miscarriage of justice, and second, that the undisputed evidence showed that as a matter of law that the petitioner had been entrapped into making such sale, if she made such sale.

Specifications of Error

1. In holding that the evidence was sufficient to sustain the petitioner's conviction, and that there was no evidence that would show a miscarriage of justice by the conviction of the petitioner.

2. In holding that the issue of entrapment was one of fact, and that the finding of the jury on such issue, was conclusive on the appellate court.

3. In holding, inferentially, that petitioner although charged with a sale of narcotics, that the Government could show other extraneous offenses committed by the petitioner, which had no connection with said alleged sale, intent and system not being an issue.

Reasons for Granting the Writ

1. Petitioner was denied the requisites of a fair trial by due process of law, in that there was no evidence of probative force to support the conviction of the petitioner of the offense charged.

2. Petitioner was denied the requisites of a fair trial by due process of law in that the undisputed evidence offered by the Government showed the petitioner was entrapped into being a principal to any sale to the agent, Stowers, the facts bringing the case squarely within the case of *Sorrells vs. United States*, 287 U. S., page 435.

3. Petitioner was denied the requisites of a fair trial by due process when the Government proved before the jury evidence of the petitioner having bought and concealed stolen property, or property which she thought had been stolen.

ARGUMENT

POINT I.

A. *Sufficiency of Evidence.*

Petitioner concedes that if the records show that if there was any evidence of probative force to show the guilt of the petitioner of the offense charged of a sale to a narcotics agent, Stowers, and that the fact of the sale became an issuable fact under the testimony, that the finding of the jury was binding on the trial court, the Court of Appeals, and this Court, but the petitioner claims that the "no evidence rule" applies in this case, and that the trial court on its own motion should have instructed the jury the return a verdict of not guilty under the proof offered by the Government. Petitioner believes that it will be conceded that the only testimony offered by the Government to sustain the allegations of its indictment charging such sale was the witness, Sam F. Stowers, a narcotics agent for the Federal Bureau of Narcotics, and that if his testimony does not show a sale, then an innocent person has been convicted, and the conviction should not be permitted to stand. We believe that it will be conceded that the agent, Stowers, did not directly purchase any narcotics from petitioner, but that he claimed that he purchased it from Najera, so the sole question is whether the testimony of the agent shows that the petitioner was a principal to this alleged purchase by the agent and sale by Najera. Now, therefore, we only have to analyze the testimony of the government agent, and if his testimony shows an issuable fact required to be submitted to the jury, then petitioner has no complaint, but if the testimony of the agent fails to show beyond a reasonable doubt that the petitioner was guilty of the charge in the indictment, that the conviction should not be permitted to stand. The Court

of Appeals in its opinion quotes in a footnote some of the testimony of Stowers but not all. Stowers testified in substance that on or about the 12th day of June, 1952, he was a narcotics agent of the Federal Bureau of Narcotics stationed at Dallas, Texas, and that on or about that date he had occasion to see the petitioner in San Antonio, Texas, and about 8:30 on that date he went to the H. E. B. Store in San Antonio, and purchased $57.41 worth of groceries and meat and drove to petitioner's home with the groceries and parked down underneath the bridge on New Braunfels Ave. and that at that time Richard Najera drove up by the side of him, and that he then walked to the front door of the house and knocked and Mrs. Demos came to the door, that he told her that his name was Jesse Thomas, and that he had a lot of groceries in the car to get rid of, asked for someone to help him carry them into the house, and that at that moment Najera arrived at the door, and that Najera had a conversation in Spanish which he did not understand, and that Najera walked back to the car and each of them picked up a box of groceries and went back into the kitchen with the groceries, that he was then given a sheet of paper and another man was given a sheet of paper, and Najera took the groceries out of the box and that the witness made a total of each item, and the other man made a total on the other sheet, that he arrived at a figure of $49.21 and the other man arrived at a figure of $49.70, that petitioner handed him $25.00 and said that was all right, just to let it go at $25.00. The witness then testified that the petitioner was paying him half price for the groceries, that he then told her that he had some business that he would like to talk to her about, and asked if she would come in the front room, and that they then left the kitchen and went in the front room of the house, and that he then told Mrs. Demos that he had

just come from Dallas, and that he had about $2,000.00, that he had just made a good store in Dallas, and that he had his wife working for him; in other words that his wife had just stolen the groceries and that he told her that even if he had all that money that he was not going to throw it away, and that he was going to work immediately in San Antonio. That they talked about stealing groceries, and that he told Mrs. Demos that his wife was hooked on stuff, that she asked him what he meant by that and that he answered heroin, morphine or dilaudid, that she then answered, "a dope addict," in other words, and he answered "Yes" and that he had to have quite a bit of it to keep her going, that she would get sick if she didn't get it, that at times he didn't need any money but that he did need some stuff—some narcotics, and that he also told her that he was trying to get rid of his wife because she was trying to get him hooked on the stuff, and that she said "That's smart; it is bad to get to fooling with it," that he told her that he was down here from Dallas, that there was a pick-up on him there, and that he gave her the license number of the car he was driving, and asked her to check around to see if the police knew that he was in San Antonio or were looking for the car, that they then left the living room and went into the dining room, and he wrote down the license number for her on the sheet of paper, that they then returned to the front room, and he told petitioner that if he got picked up by the police in San Antonio, that he would have to be released in a hurry before they found that there was a pick-up for him in Dallas, Texas, that she then said if he ever got picked up to notify her immediately, and that she gave him a telephone number at which to reach her, giving him the number, that he then asked her how much one gram of the stuff would sell for, thirty or thirty-five

dollars, and that she replied "That's right." That he then said that he would appreciate it very much if she would help him out in obtaining some stuff, and that she said, "Go out on the front porch and wait, and that she would call Kios, who was Najera, that he walked out on the porch and was joined immediately by Najera, who asked him how much he wanted; and he said "One gram," that Najera told him to drive around the block and park by the railroad track, and that about a minute or two after he arrived, Najera walked to the car and handed him two small cellophane packages for which he paid him $30.00, and that he then left the vicinity, and on June 17th, 1952, he had another conversation with petitioner at which she told him not to bring any more groceries to her house, that it was too dangerous at that time, and that she thought it better if he stayed away for several days and not to come around anymore, and not walk into a trap, and that he told her that he agreed with her and that was fine, but that he needed some stuff to keep his wife working, that he didn't trust any of the other people that he was dealing with, that he then offered her $90.00 and for her to deliver to him three grams of heroin, but that she refused, saying that she might lose the money, and that if she did, that he would expect her to pay it back, and that he agreed with her, and that she then told him that she would contact Najera and try to have him deliver to him three grams that night, and then left Mrs. Demos, calling back on the telephone, and that she told him that she could not locate the heroin, that he never had any telephone conversation in her presence.

On cross-examination he testified that the distance from where Najera lived and petitioner lived was two miles. (S. F. page 18). He further testified on cross-examination that meeting Najera at the petitioner's house on June 12th,

1952, was just a coincidence, as far as he knew. (S. F. 22, 23). He further testified on cross-examination as follows: "Let me ask you, didn't she tell you something like this (on June 17th, 1952), 'I know that there are some people who have come around the house and who have hung around the house that use the stuff, and for all that I might know they might sell the stuff, but I don't have anything to do with it myself'; now, isn't that what she told you? A. Yes." (S. F. page 28).

Does this testimony by the agent himself, and upon which the Government must rely, establish a sale by petitioner, as charged in the indictment? The only possible circumstance showing any connection with the sale by Najera, was the testimony of the agent, Stowers, that after he had told the petitioner about his wife being an addict, and being subsequent to the time she had told the agent that it was smart not to fool with narcotics and was bad to get to fooling with narcotics, that he urged her to help him out and made the remark, "I would appreciate it very much if you would help me out on obtaining some stuff" that she told him to go out on the porch and wait and that she would call Kios, who seems to have been Najera, that he then went out on the porch, was joined immediately by Najera, who said how much was it that he wanted, and that he said one gram, and that he told him to drive around the block and to park by the railroad track, and about one minute after he arrived Najera walked up to the car and handed him two small cellophane packages, for which he paid Najera thirty dollars and left the vicinity. The agent testified as shown above that he suggested what the "stuff" sold for and named the price and she replied "that's right," and that he said he would appreciate it if she would *help him out on obtaining some stuff*, and she said, "Go out on the front porch and wait, and that she would call Kios. He

further testified that he walked out on the porch and was joined almost immediately by Najera, who asked him how much he wanted. Here we have a situation where the agent was in a room with petitioner, she was asked to help him out, he walked out on the porch and almost immediately Najera appeared and asked him how much. There is no testimony that the petitioner in fact did call Najera, or that she had a conversation with him, or that she even left the room that she was in, or just what she said to Najera, if she did talk to him. We have the suspicion alone, that she may have said something to Najera about narcotics. The trial court did not charge on circumstantial evidence, and yet the jury must have convicted the petitioner upon this bare suspicious circumstance alone, because that it was all that the Government had. And yet the testimony of the officer shows that after this incident he tried to obtain narcotics from the petitioner and failed. Rebuffed before the alleged sale, rebuffed later, the Government seeks to magnify this one incident into proof of a sale by the petitioner as a principal. But who was the petitioner the agent of, if she did call Najera? The agent had implored her to help him out to procure narcotics for his addict wife, and that he would appreciate it if she helped him out. If she did help him out, she would be clearly the agent of Stowers. The proof does not show that she ever received a dime for the narcotics, that she ever had it in her possession, and the only possible connection shown by the one circumstance was that she may have possibly responded to the plea of the agent to help out, and called Najera. It is true that in the case of *Jin Fuey Moy vs. U. S.*, 254 U. S., page 190, this Court held that where a physician wrote a prescription for an addict suffering only from addiction, that in effect he became a principal, in that writing such prescription he aided in the

sale. We can see good reason for such holding, but that authority would not support a conclusion that one who is induced to assist an agent to procure narcotics for a sick wife of such agent, and did nothing but put him in touch with the seller, was the agent of the seller and not the agent of the purchaser. We have many cases in liquor cases that where a person is induced to obtain liquor for a person as an accommodation that such person is the agent of the purchaser and not the seller. *Martin vs. State,* 241 S. W. (2d), page 148; *Crawford vs. State,* 58 S. W., page 1006, and many others. It has been uniformly held that where the person charged with a sale is shown to have acted as the agent of the purchaser in the transaction, he is not guilty of being a principal to the sale.

Petitioner submits that the undisputed evidence by the government agent showing that the petitioner acted as the agent of the officer in purchasing said heroin from Najera, she could not be guilty as a principal, and that there was no evidence of probative force authorizing the court to submit the guilt of the petitioner under the indictment charging her with a sale.

POINT II.

B. *Entrapment of the Petitioner was Shown as a Matter of Law.*

The testimony of the government witness, Stowers, is set out under the argument on Point No. 1. It is the contention of the petitioner that the testimony of Stowers shows as a matter of law that there was an entrapment. The Court of Appeals held that the law of entrapment had been announced by this Court in the case of *Sorrells vs. United States,* 287 U. S., page 435. This Court in that case adopted the applicable principle announced by Judge

Woods in the case of *Newman vs. United States*, 299 Fed. 128, which was as follows:

"It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the minds of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped from sound public policy from prosecution therefor."

This same rule, in a little different language, has been announced by the Court of Appeals for the Fifth Circuit in the case of *Hunter vs. United States*, 62 Fed. (2), page 217. That case was a liquor case, and the facts showed that a government agent asked the defendant where he could obtain good liquor, that his mother was sick at home with the flu, the defendant told him that he thought he would be able to get him some, and did get him some, and carried it around to the agent where he was arrested. The Circuit Court made this statement of the law of entrapment:

"In cases where the intention to violate the law originates in the mind of the defendant, and the government agents or representatives do no more than merely to afford him an opportunity to commit a crime, in order to make out a case which can be successfully prosecuted, there is not entrapment. The government agent can even go so far as to aid in the commission of the crime without affecting the right of prosecution. But it is well settled that if they urge, persuade, solicit, seduce or cause another to commit a crime, their action in doing so is fatal to the prosecution." In the instant case, we have an agent who in order

to have a plausible excuse to visit the home of the petitioner, buys groceries, goes to the house and sells them to her for half price, telling her that his wife had stolen such groceries. After the delivery of the groceries the agent told the petitioner that he wanted to talk to her, and asked her to come to the front room. He then told her that he had come from Dallas, had two thousand dollars, that his wife was working for him; in other words, that his wife had stolen the groceries for him, that he then told her that his wife was hooked on stuff, which means that she was a dope addict, that it took quite a bit to keep her working, that she would get sick if she didn't have it, and he needed some stuff. After this statement to the petitioner she made the statement to him, "That's smart, it is bad to get to fooling with it." He then told her that there was a pick-up for him, and enlisted her help if he was arrested. That then the agent stated what the price of stuff was, and she said "that's right," and that then he said, "I would appreciate it very much if you could help me out in obtaining some stuff," and that then she told him to go out on the front porch, and that when he went out Najera appeared, and he arranged to make a purchase from him which was consummated later. The record also shows that later the agent tried to persuade the petitioner to take $90.00 and purchase some "stuff," and that she refused to take it. That later he tried to make a purchase from her, and that she told him that there were some people who hung around the house that used the stuff, and that for all that she knew they might sell it, but that she didn't have anything to do with it herself.

Here we have persistent and continuous persuasion, false representations, trying to play on the sympathy of the petitioner with telling her that his wife was an addict, and that she suffered if she did not have it, being rebuffed,

and advised not to fool with it, then begging her to help him out to get some of the "stuff" for his wife, and finally yielding to his persuasion, told him to go out on the porch, and that then Najera appeared and he made a purchase from him later consummated at a meeting at a different place. Every element of an entrapment is presented by the testimony of the government agent, and no stronger facts could be presented to show that the government is estopped to prosecute the petitioner. This is not a case where the testimony of a defendant would raise an issue of entrapment, which would require such disputed issue to be submitted to the jury. This is the undisputed evidence offered by the government alone, and therefore, the petitioner believes and submits that entrapment was shown by the government as a matter of law.

POINT III.

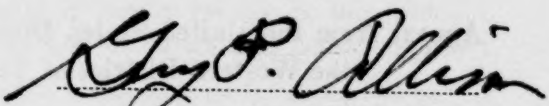
C. *Admitting Proof of Extraneous Offenses not Connected With Charge Against Petitioner.*

The petitioner was charged with a sale of heroin to the narcotics agent, Stowers. Stowers was permitted to testify and it is true that no objection was made, about how he went and bought some groceries and took them to the house of petitioner and sold them to the petitioner for one-half price, which would tend to show that the petitioner was guilty of the offense of receiving and concealing stolen property. Just what bearing this evidence, obviously prejudicial to the petitioner, had on proving that she made a sale to the agent, is not apparent. It is elementary that when a defendant is on trial, you cannot prove extraneous offenses committed by the defendant unless intent or system is an issue. The defendant did not take the stand, and if she had, evidence of being

charged with an offense would not be admissible, there must have been a conviction, and yet the government by this devious method got before the jury that the petitioner was a law violator, and had no respect for law, in that she would buy and receive stolen property. Perhaps, this explains why the petitioner was convicted on what was at most a bare suspicion of the sale of heroin. Petitioner submits that this was a denial of due process in permitting this evidence of the buying of the groceries to go to the jury, and to show that she was guilty of the offense of receiving and concealing stolen property.

CONCLUSION

It is respectfully submitted that the petition for Writ of Certiorari should be granted as prayed for.



Attorney for Petitioner.

APPENDIX

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 14340

ADELAIDA LITA DEMOS, APPELLANT,

versus

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court for the Western District of Texas.

(June 26, 1953.)

Before HOLMES, BORAH and RIVES, Circuit Judges.

RIVES, Circuit Judge: The appellant was indicted along with one Richard A. Najera for having sold heroin to Sam F. Stowers in violation of Title 26 U.S. Code, Sec. 2554(a)[1]. In Counts 2 and 3 of the same indict-

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1 Title 26 U. S. Code, Sec. 2554(a) reads as follows:
"(a) *General requirement.* It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

ment, Richard A. Najera was indicted for two subsequent sales of heroin to Sam F. Stowers. Najera entered a plea of guilty to Counts 2 and 3, and both he and appellant stood trial under Count 1 of the indictment. The jury found both guilty as charged. Appellant's sentence, as a second offender, was the minimum five year term of imprisonment [26 U.S.C.A. 2557(b)(1)] and a fine of $100.00.

For reversal appellant makes two insistences: (1) that the evidence was insufficient to sustain the verdict and judgment; and (2) that the undisputed evidence established the defense of entrapment.

Sam F. Stowers was a Government narcotics agent stationed at Dallas, Texas, and was sent "on this one job" to San Antonio in that capacity. He came with "a letter of introduction from a police character in Dallas" to an ex-convict named Frazier in San Antonio. Frazier introduced him to Najera, and Najera testified:

> "He (Frazier) was with us for about two or three days first, when he first got that heroin for him, because I told him that I was scared of him, I didn't know him, or anything like that, and he said, 'Well, I will get some for him, so that you will know that he is all right,' and then he got some for him * * ."

Najera further testified that thereafter he had sold heroin to Stowers on two occasions prior to the time laid in Count 1 of the indictment.

Stowers was the only witness introduced on behalf of the Government. He testified that he had heard that the appellant operated as a "fence", taking stolen groceries for sale on the black market, and he sought to gain her confidence by apparently engaging in that

illicit trade. He purchased some groceries and meat for which he paid $57.41; and with two boxes on the back seat of his automobile containing his purchases, he drove to the appellant's house and parked his car. Immediately, apparently by coincidence, Najera drove up by the side of his car and asked him what he was doing there. He told Najera that he had a load of groceries in the back seat of the car that he had to get rid of. He walked on ahead of Najera to appellant's house, knocked on the door, introduced himself to the appellant as Jesse Thomas, and stated that he had a load of groceries and wanted someone to help carry them in the house. Najera and the appellant had a conversation in Spanish and Najera and Stowers walked to the automobile, picked up the two boxes of groceries, and carried them into the house, where their values were tabulated and the appellant paid Stowers $25.00 or approximately one-half price for the groceries. What then occurred is best told in the language of the witness, which we have quoted in the margin[2].

Stowers thereafter made repeated efforts to purchase heroin from the appellant, but each time without suc-

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2 "Q. She was paying you half-price for the groceries?

"A. Half price, that is right. I then told Mrs. Demos I had some business that I would like to talk to her about, and would she come with me to the front room, and we then left the kitchen and went into the front room of the house, and I then told Mrs. Demos that I had just come into town from Dallas, and that I had about two thousand dollars, that I had just made a good store in Dallas, and I had my wife working for me; in other words, I told her that my wife had stolen the groceries, and I told her that even though I had all this money, I was not going to throw it away, and I was going to work immediately in San Antonio.

"Q. You all talked about stealing groceries, is that right?

"A. Yes, sir. And I then told Mrs. Demos that my wife was hooked on stuff.

"Q. And what did you mean by that?

"A. Heroin, morphine or dilaudid.

"Q. A dope addict, in other words?

"A. Yes, narcotics, and that I had to have quite a bit of it to keep her working; in other words she would get sick if she didn't get

cess, "She always left it hanging in the balance, so to speak". On one occasion he offered her $90.00 for her to deliver to him three grams of heroin. She refused but told him that she would contact Najera and try to have him deliver the heroin.

The appellant did not testify in her own behalf and the court properly charged the jury that such was her

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it, and at that time I didn't need the money, but I did need some stuff—some narcotics, and I also told her that I thought I was going to try to get rid of my wife, because she was trying to get me hooked on the stuff myself * * *.

* * * *

"Mr. Herring:

"You told her that you didn't want to get hooked on the stuff yourself, and what did she say then?

"A. She said, 'That's smart; it is bad to get to fooling with it,' and then I told her that I was down here from Dallas, that there was a pick-up on me up there, and I gave her the license number of the car that I was driving, and asked her to check around to see if the police were—if they knew I was in San Antonio, or were looking for the car.

"Q. By pick up, you meant that there was a warrant out for you up there at that time?

"A. Yes, sir, and we then left the living room and went into the dining room, which was located between the living room and the kitchen, and I wrote down that license number for her on a sheet of paper—I believe it was on a white envelope, and we then returned to the front room, and I then told Mrs. Demos that should I get picked up by the police in San Antonio, I would have to be released in a hurry before they found out that there was a pick-up on me in Dallas, Texas, and she then told me that if I ever got picked up—my wife and I —, that she —

* * * *

"She told me to call her immediately, and gave me a telephone number at which to reach her, and that number was G-5417—I believe, but I am not sure about that number—and I then asked Mrs. Demos, I said, 'How much does one gram of the stuff sell for, thirty or thirty-five dollars?' and she replied, 'That's right,' and I said 'I would appreciate it very much if you would help me out on obtaining some stuff,' and she said 'Go out on the front porch and wait, and I will call Kios.'

"Mr. Herring:

"Q. Who is Kios?

"A. The defendant Najera, and I then walked out on the front porch and was joined almost immediately by him, and he said, 'How much was it you wanted?' and I said, 'One gram,' and he then told me to drive around the block and to park by the railroad track; that was at the corner of Rogers and Crosby Streets, and about one minute after I arrived, he walked up to the car, and handed me two small cellophane packages, for which I paid him thirty dollars, and then I left the vicinity."

privilege, and that her failure to testify should not be considered as any evidence of guilt. Najera testified admitting that he was an addict to heroin and was guilty of making a number of sales to Stowers, denying that he made the sale charged in Count 1 of the indictment or that the appellant had any connection with any of the sales. He testified that, when Stowers brought the supposedly stolen groceries, he happened to be at the appellant's home in the performance of some carpenter repair work for the appellant. He lived on the opposite side of San Antonio from appellant. The appellant was a half sister of Najera's wife.

There was no motion for a directed verdict on the ground of the insufficiency of the evidence. The appellant's counsel recognizes the validity of the rule that, in the present state of the record, the evidence will be reviewed by this Court only to prevent a manifest miscarriage of justice. *Thomas, et al., vs. United States,* 5th Cir., 189 F. 2d. 430. By that test, in our opinion, the evidence was clearly sufficient to sustain the appellant's conviction.

The appellant did move the court to instruct the jury to return a verdict of not guilty on her behalf, "on the grounds that the undisputed evidence shows a careful and deliberate planned entrapment of said defendant". The court denied that motion but orally charged the jury as to the defense of entrapment as set out in the margin[3].

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3. "If you are satisfied that prior to the commission of the acts alleged to constitute the crime, that the defendant Adelaida Lita Demos never conceived any intention of committing the offense, but that the officers of the Government incited and by persuasion and representations lured her to commit the offense alleged in order to entrap,

The opinion of the Supreme Court in *Sorrells vs. United States,* 287 U.S. 435, is the controlling authority in the federal courts on the defense of entrapment. Among other authorities, that opinion refers to the leading case of *Butts vs. United States,* 8th Cir., 273 F. 35, opinion by Circuit Judge Sanborn, and to the decision of this Circuit in *Gargano vs. United States,* 24 F. 2d. 625, opinion by Circuit Judge Bryan. The defense is permitted upon the theory that, though the acts of the defendant come within the letter of the statute, they may be foreign to its purpose. "Fundamentally, the question is whether the defense, if the facts bear it out, takes the case out of the purview of the statute because it cannot be supposed that the Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose." *Sorrells vs. United States, supra,* at p. 452. The controlling question was stated to be "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." Id. at p. 451. The opinion carefully draws attention that,

> " * the defense of entrapment is not simply that the particular act was committed at the

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arrest, and prosecute her therefor, then these facts are fatal to the prosecution and the defendant Adelaida Lita Demos is entitled to a verdict of not guilty.

"When it is suspected that a crime is being committed and the question is as to who the guilty persons are, traps may be laid and baited in order to catch the guilty person. A suspected person may be tested by being offered opportunity to transgress in such manner as is usual therein. The question is not one of laying a trap or of trickiness or deceit which is permissible in order to detect a person in the commission of crime, but is one of seduction or improper inducement to commit the crime. In other words, the officers or informers may give the defendant an opportunity to violate the law, but they cannot by persuasion or inducement cause him to commit a crime which he would not otherwise have committed and thereafter successfully prosecute him."

> instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises. Grimm vs. United States, supra (156 U.S. 604, 610). The predisposition and criminal design of the defendant are relevant." Id. at page 451.

In the case from this Circuit, *Gargano vs. United States, supra,* at page 625, it was well said that, " * * * the test was whether the offense originated in the mind of the accused, or in the mind of the official * * *." For the offense to originate in the mind of the defendant, it was not necessary that the defendant be the instigator of the particular sale or act, but only that she have the general intention to commit such an offense whenever the opportunity offered.

While the appellant's former conviction would have been admissible before the jury when it appeared that she was relying on the defense of entrapment [See *Carlton vs. United States,* 9th Cir., 198 F. 2d. 795], it was not actually brought forth until the pre-sentence hearing. Nor did the Government produce evidence before the jury to show its grounds for suspecting that the appellant was engaged in the illicit traffic in drugs, or to show her pre-disposition to commit the offense. The jury were authorized, however, to consider the appellant's willingness to commit the crime as evidenced by her ready compliance with the agent's request[4]. The evidence in this case on the issue of entrapment does not seem to us nearly so strong for the defendant as was the evidence recited in *Sorrells vs. United States,*

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4 See full opinion of Judge Learned Hand in United States vs. Sherman, 2nd Cir., 200 F. 2d. 880 & 882.

supra, and yet in that case the extent of the holding of the Supreme Court was "that the trial court was in error in holding that as a matter of law there was no entrapment and in refusing to submit the issue to the jury." *Sorrells vs. United States, supra,* at p. 452. See also *Hunter vs. United States,* 5th Cir., 62 F. 2d. 217; *Weathers vs. United States,* 5th Cir., 117 F. 2d. 585. In the instant case the District Court submitted the issue to the jury in a charge (Footnote 3, *supra*) to which appellant's counsel stated that he had no objections. It appearing that there is no error in the record, the judgment is,

AFFIRMED.

A True Copy:
Teste:

.....,
Clerk of the United States Court of
Appeals for the Fifth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 312

ADELAIDA LITA DEMOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 77-84) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1953 (R. 84) and a petition for rehearing was denied on August 6, 1953 (R. 87). The petition for a writ of certiorari was filed on September 3, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the petitioner's conviction of selling heroin not in pursuance of a written order form as required by statute.

2. Whether the trial court erred in submitting the issue of entrapment to the jury under proper instructions.

3. Whether the trial court erred in not excluding on its own motion evidence of a transaction relating to stolen groceries which immediately preceded the illicit sale of narcotics, where petitioner made no objection to the admission of such evidence, at any time.

STATUTE INVOLVED

26 U.S.C. 2554(a) provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

STATEMENT

On October 7, 1952, a three-count indictment was returned in the United States District Court for the Western District of Texas, the first count of which charged that on or about June 12, 1952, petitioner and a co-defendant Richard A. Najera made a sale of heroin to Sam F. Stowers, which sale was not in pursuance of a written order form and

was therefore in violation of 26 U.S.C. 2554(a). The second and third counts to which Najera pleaded guilty, charged him alone with subsequent sales to Sam F. Stowers on June 15, 1952, and June 17, 1952 (R. 1-3). After a jury trial petitioner and the co-defendant were both found guilty under count one and petitioner was sentenced to five years' imprisonment as a second offender (R. 61-63). The Court of Appeals for the Fifth Circuit affirmed the conviction (R. 84).

The evidence for the Government may be summarized as follows:

Sam F. Stowers, a federal narcotics agent stationed in Dallas, Texas, testified as a Government witness that he was introduced to one Frazier in San Antonio through a letter written by a "police character" in Dallas (R. 20-21). On his arrival in San Antonio, Stowers was introduced by Frazier to the co-defendant Najera (R. 21), a heroin addict (R. 45). Although Stowers told Najera that his wife was addicted to narcotics, he did not ask Najera to procure any for him at that time (R. 22). Stowers did, however, tell Najera that his wife sold stolen groceries, and asked to be introduced to petitioner, who, he understood engaged in such transactions (R. 23).

The evidence does not reveal that anything was done as a result of this conversation. About 8:30 P.M. on June 12, 1952, however, Stowers went to a grocery store and purchased $57.41 worth of groceries. He then drove to the vicinity of petitioner's home, the address of which he had previ-

ously obtained from Frazier. (R. 7, 24.) As Stowers was parking his car, Najera drove up (R. 7-8). Stowers told Najera that he had a load of groceries in the back of his car and that he had to get rid of them (R. 13). Stowers then walked to the front door of petitioner's house, and when she came to the door, introduced himself by an alias name and told petitioner that he had a quantity of groceries in his car that he wanted "to get rid of" and asked for help in carrying them inside. At that moment Najera arrived and after a brief conversation with petitioner in Spanish, helped carry them into the house. (R. 8-9, 13-14.) After petitioner paid Stowers for the groceries at half of their value, Stowers told petitioner that his wife had stolen the groceries, that she was a dope addict, and needed drugs. Stowers also said that he was wanted by the police in Dallas (R. 14-15). Stowers asked her whether a gram of the "stuff" would sell for about $30 or $35, and she replied in the affirmative. Then Stowers asked her to help him obtain some and she replied (R. 16), "Go out on the front porch and wait, and I will call Kios" [Najera]. Stowers and Najera then walked out on the porch together. Najera asked how much Stowers wanted, and the latter replied that he wanted one gram; Najera told Stowers to meet him at a street corner nearby. Stowers went to that place, and about a moment after his arrival he was again met by Najera who came up on foot and handed him two cellophane packages for which Stowers paid him $30. (R. 16-17, 27-28.) It was stipulated on the trial that the

packages contained heroin sold without an order form (R. 19).

On June 17, 1952, Stowers met petitioner at the same corner where he had purchased the heroin before and offered her $90 for three more grams. She refused this offer saying she might lose the money, but she offered to contact Najera and have him deliver the heroin that night. (R. 17-18.) Stowers called petitioner later about the heroin and she said she could not locate it (R. 18). Other attempts to buy heroin from petitioner also failed. On each attempt, Stowers testified (R. 33), "She always left it in the balance, so to speak."

ARGUMENT

1. Despite petitioner's failure to move for a directed verdict on the trial of this case on the ground of insufficiency of the evidence, the Court of Appeals reviewed the evidence and found it sufficient to sustain the conviction. Petitioner's present contention of insufficiency (Pet. 5-11) is amply met by the opinion below (R. 77-84), and warrants no further review.

The evidence establishes the complicity of petitioner in the sale alleged in the first count of the indictment. It was she who answered Stowers' inquiry, made during the course of another transaction, as to the price of heroin. When Stowers asked her about obtaining some, she readily called Najera who was visiting her home, and with whom the evidence shows she was on familiar terms. The sale was transacted a short distance from petition-

er's house under circumstances which indicate that Najera came directly from there with the heroin. In short, the evidence fully justifies the conclusion that it was petitioner who was the principal in the sale.

2. Petitioner contends (Pet. 11-14) that the defense of entrapment should not have been submitted to the jury under instructions (see R. 49-50), but should have been disposed of as an issue of law. As this Court held in *Sorrells* v. *United States,* 287 U.S. 435, 452, however, the issue of entrapment is one to be resolved by the jury under proper instructions as to the law. Petitioner does not assert that the instruction given is not a correct statement of the law, and it must be presumed that the jury followed the instructions and found as a fact that entrapment did not exist. *United States* v. *Spadafora,* 181 F. 2d 957, 959 (C.A. 7), certiorari denied, 340 U.S. 897.

It is clear that the evidence supports the jury's verdict. There is no entrapment where the accused is already engaged (1) in an existing course of similar criminal conduct, (2) had already formed a design to commit the crime or similar crimes; or (3) was willing to do so as evidenced by ready complaisance. *United States* v. *Chiarella,* 184 F. 2d 903, 908 (C.A. 2), vacated for resentencing, 341 U.S. 946. Clearly under the instant facts the petitioner was already engaged in similar illicit activity, and evidenced ready complaisance when the transaction was broached by Stowers. Her readiness to engage in crime is shown by her knowledge of the price of

heroin and her promptness, when asked about a sale, in calling Najera. She can hardly contend that she was led into crime by a government agent when the evidence indicates that she and Najera, her co-defendant, were already in possession of the heroin when the subject was brought up. In short the criminal design neither originated with a government officer nor did an officer "* * * implant in the mind of an innocent person the disposition to commit the alleged offense * * *." *Sorrells* v. *United States, supra* (287 U.S. at p. 442).

3. Finally, petitioner contends, apparently for the first time, that the trial court erred in admitting evidence as to the sale of groceries by Stowers to petitioner. Such evidence was, however, highly relevant since this transaction which immediately preceded the narcotics transaction, explains the meeting between Stowers and petitioner, the entry of Najera on the scene, and the other events leading up to the sale of narcotics. The Court of Appeals for the Second Circuit in addressing itself to an analogous situation said "* * * it is never a ground of objection to evidence directly relevant to the crime that it exposes the accused to odium, or even implicates him in another crime." *United States* v. *Grayson,* 166 F. 2d 863, 867. It is significant that no objection to the admission of such evidence was made at the trial or before the Court of Appeals. See Rule 51, F. R. Crim. P.

CONCLUSION

This case was decided under established legal principles, and further review is not called for. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1953.

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